STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

DELILAH HILL, STEVEN HUNTINGTON, and SANDRA HUNTINGTON,

Defendants-Appellees.

UNPUBLISHED
August 16, 2005

No. 261543
Wayne Circuit Court
LC No. 04-402445-CK

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff brought this declaratory action to determine its duty to defend and indemnify its insured under a homeowner's policy, defendant Hill, in a civil action brought by the Huntingtons for injuries to Steven Huntington ("Huntington") when he was shot by Roderick Gunn during an altercation at the home where Hill and Gunn lived. Hill was convicted of assault and battery for her role in the attack on Huntington. Gunn was convicted of felonious assault and felony firearm. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the injuries did not arise from an "occurrence" within the meaning of its policy, and that the policy exclusion for intentional or criminal acts applied. The trial court denied plaintiff's motion and granted declaratory judgment in favor of defendant Hill. Plaintiff appeals as of right. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court's decision granting or denying summary disposition in a declaratory judgment action. *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999). Moreover, the construction and interpretation of the language of an insurance contract is an issue of law that is reviewed de novo. *Allstate Ins Co v Muszynski*, 253 Mich App 138, 140; 655 NW2d 260 (2002).

Plaintiff argues that Huntington's injuries did not arise from an "occurrence," which is defined in the homeowner's policy as "an accident . . . resulting in bodily injury . . . ."

"Accident" means "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Allstate Ins Co v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002) (citations and internal quotation marks omitted). "Accidents are evaluated from the standpoint of the insured, not the injured party." *Id.*, p 282. In some instances, an insured's intentional act may

constitute an accident, and thus an "occurrence." *Id*. "[I]f both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does not constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured." *Id*., pp 282-283. Thus, where an insured pulled the trigger of a gun he mistakenly thought was unloaded, the act was intended, the result was not, and the discharge was an accident. *Id*., pp 290-291. But an injury does not arise from an "accident" where an insured intends the results of his deliberate acts, but not the magnitude of the results. *Id*., pp 289-291. Thus, where insureds intentionally set fire to a building, but it spread to another building, the act was not an accident. *Id*., p 290; *Frankenmuth Mut Ins Co v Masters,* 460 Mich 105, 116; 595 NW2d 832 (1999). Similarly, where an insured engaged in a fight intentionally tripped his opponent, the insured reasonably should have expected injury and the fact that the injury was not the specific harm intended is irrelevant; the injury did not result from an accident. *McCarn, supra,* p 289; *Nabozny v Burkhardt,* 461 Mich 471; 606 NW2d 639 (2000).

In light of Hill's conviction for assault and battery, there is no genuine issue of material fact that Hill intended to injure or put Huntington in fear or apprehension of an immediate battery. See *People v Datema*, 448 Mich 585, 602; 533 NW2d 272 (1995); *State Farm Fire & Casualty Co v Fisher,* 192 Mich App 371, 376; 481 NW2d 743 (1991); *Aetna Casualty & Surety Co v Sprague,* 163 Mich App 650, 654; 415 NW2d 230 (1987); *Masters, supra* at 107 n 1 (in light of convictions for arson, the insured's intent "is a settled question.") Hill's criminal actions in this regard created a direct risk of harm to Huntington.

With respect to the contention that the consequences (the shooting by Gunn) were not intended by Hill and should not have been reasonably expected, we find *Allstate Ins Co v JJM,* 254 Mich App 418; 657 NW2d 181 (2002), instructive. That decision also involved actions by an insured that culminated in harm by a third party. The insured (Morton) allegedly allowed minors to have parties at her home and supplied them with alcohol. At one of these parties, a minor (JJM) consumed alcohol, passed out, and was sexually assaulted by another minor (Stringer). The underlying complaint alleged that the insured was vicariously liable for the assault and battery and also alleged claims of gross negligence, social host liability, nuisance, and premises liability. The insurer argued that JJM's injuries did not arise from an occurrence. This Court agreed.

> No "accident" occurred in this case, either as a result of Morton's conduct or Stringer's. JJM's injuries were the result of the intentional act of a third party, Stringer, not some " 'undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.' " *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999), quoting *Arco Industries v American Motorists Ins Co*, 448 Mich 395, 404-405; 531 NW2d 168 (1995), overruled by *Masters, supra* at 116. In *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000), our Supreme Court addressed unintended or "accidental" injuries that occur as the result of intentional acts. The Court held that such acts are not "accidents" triggering coverage under an insurance policy. Specifically, the Court stated:

> "[W]here a direct risk of harm is intentionally created, and property damage or personal injury results, there is no liability coverage even if the specific result was unintended. It is irrelevant that the character of the harm that actually results is different from the character of the harm intended by the insured. [*Id.* at 481, quoting *Frankenmuth Ins Co v Piccard*, 440 Mich 539, 557; 489 NW2d 422 (1992) (Cavanagh, C.J., dissenting).]"
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> Under *Nabozny*, no accident giving rise to coverage occurred in this case because Morton reasonably should have expected that giving minors enough alcohol to allow them to pass out would result in harm. The fact that the specific harm that occurred was Stringer's intentional act of rape rather than alcohol poisoning is irrelevant to the determination whether the occurrence was an accident. [*JJM, supra*, pp 422-423.]

In the present case, plaintiff was entitled to summary disposition in its favor because the injuries did not arise from an "occurrence." There is no genuine issue of material fact that Hill should have reasonably expected that Huntington would be harmed as a result of her criminal actions. The fact that the specific harm that occurred was the result of Gunn shooting him is irrelevant to the determination whether the incident was an accident and an "occurrence" under the policy. Despite artful pleading in the underlying complaint, no accident occurred in this case.

In light of our conclusion, we need not address the policy exclusion for intentional or criminal acts.

Reversed and remanded for entry of judgment in favor of plaintiff. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens